Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KINAM GOLD INC., a Delaware Corporation, formerly known as Amax Gold, Inc.; AMAX GOLD, INC. SEPARATION PLAN FOR KEY EMPLOYEES; AMAX GOLD, INC. BENEFITS COMMITTEE; KINROSS GOLD CORPORATION BENEFITS COMMITTEE; and KINROSS GOLD CORPORATION,

Petitioners,

v.

MARK LETTES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An employer, engaged in interstate commerce, created a Separation Plan for Key Employees. At the discretion of a Plan Administrator, the Separation Plan provides lump-sum severance benefits to select employees who suffer a "Separation from Service" not for "Cause," but due to a "Change in Control," and who are not offered "Comparable Employment." The Separation Plan specifies a source of funding, eligibility standards for participants, formulae for benefit calculations, claims and appeals procedures, and participants' rights under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The question presented here is: Does *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), provide the proper standard to determine whether ERISA preempts state common law claims for benefits from the employer-sponsored Separation Plan for Key Employees?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petitioners are Kinam Gold, Inc.; Amax Gold, Inc. Separation Plan for Key Employees; Amax Gold, Inc. Benefits Committee; Kinross Gold Corporation Benefits Committee; and Kinross Gold Corporation. Kinross Gold Corporation does business in the United States as Kinam Gold, Inc., a Delaware corporation. Kinross Gold Corporation is a nongovernmental corporation. Trimark Financial Company, a Canadian company, owns in excess of 10% of Kinross Gold Corporation stock. The other named petitioners are not corporations.

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STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals issued its opinion and order on January 23, 2001. Petitioners did not seek rehearing before the Court of Appeals. This Court has jurisdiction to review this order on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §§ 1002(1)-(3), 1003, 1144(a) (1994). (App. D.)

STATEMENT OF THE CASE

A. Factual Background.

Amax Gold, Inc. ("AGI") adopted a Key Employee Separation Plan ("AGI Plan" or "Plan").[1]

1. *The AGI Plan Provides Separation Benefits.*

Subject to the Administrator's discretionary determinations described below, the Plan provides an Eligible Employee severance benefits if the employee incurs a "Separation from Service" in anticipation of, or within 12 months following, a "Change of Control." (Plan at L 6.)

The Plan defines "Separation from Service" to include: (a) the employer's termination of the Eligible Employee's employment without "Cause," and (b) the Eligible Employee's termination of his or her own employment for "Good Reason." (Amendment at L 25.) The employer has "Cause" to terminate an Eligible Employee's employment, *inter alia*, for "substantial and continued" poor performance. (*Id.*) An Eligible Employee has "Good Reason" to terminate employment if his or her compensation, benefits, title or duties are "substantially" reduced, or if the employer transfers the employee to a distant workplace. (*Id.* at L 26.)

A "Change of Control" as defined under the Plan occurs when, for example, an unrelated entity buys twenty percent or more of the outstanding stock of the company, the current

---

1. The Plan and its Amendments appear in a lodging appendix. They appear in the record beginning at Appellant's Appendix 245 and 740, respectively.

members of the Board of Directors cease to be a majority of the Board of Directors, or the shareholders choose to liquidate the company or sell substantially all of its assets. (Plan at L 3-5.)

An Eligible Employee is *not* entitled to benefits under the Plan if AGI or a successor offers the Eligible Employee "Comparable Employment" following a Change of Control. (Plan at L 7.) The Plan defines an Eligible Employee's new position as "Comparable" to the previous position if it: "(a) is reasonably comparable without substantial diminution of duties . . . (b) pays substantially the same Compensation, and (c) is entitled to participate in an incentive plan at substantially the same long-term incentive award level." (*Id.* at L 5.)

2. *The AGI Plan Provides Claims and Appeals Procedures.*

If an employee does not receive benefits, he or she may file a claim for benefits with the Administrator. (Plan at L 12.) Such a claim must be filed within ninety days of the employee's Separation from Service or the cessation of benefits. (*Id.* at L 12-13.) The Plan requires the Administrator to provide a specific written denial to the claim, including a statement of the reasons for the denial, a description of additional materials or information necessary to perfect the claim, and an explanation of the review procedure. (*Id.* at L 13.) *See also* 29 U.S.C. § 1133(1) (ERISA plan must provide claim procedure). The employee then has sixty days to seek review, and the Administrator has a further sixty days to provide a second, written determination. (Plan at L 13.) *See also* 29 U.S.C. § 1133(2) (ERISA plan must provide appeal procedure).

3. *The AGI Plan Names an Administrator with Discretion.*

The Plan names AGI as Administrator. (Plan at L 11-12.) *See also* 29 U.S.C. § 1002(16)(A) (defining "Administrator"). Among other powers, the Administrator has "complete and discretionary authority to construe and interpret the Plan, correct defects, supply omissions, and reconcile inconsistencies and ambiguities in and with respect to the Plan." (Plan at L 12.)

The Administrator resolves all questions about eligibility and the amount of benefits. (Plan at L 12.) Determining whether Eligible Employees are entitled to benefits requires the Administrator to determine, *inter alia*, whether the employee suffered a Separation from Service due to a Change of Control; substantially failed to perform his or her job; received an offer of Comparable Employment; complied with applicable confidentiality and non-competition agreements; and executed releases. (*Id.* at L 6-7; Amendment at L 25-26.)

The Administrator has duties to perform both before and after any claim for benefits. Under the Plan, the Administrator has an ongoing duty to answer questions from Eligible Employees, a duty to allow Eligible Employees to review the Plan documents, and a duty to provide copies of the documents, upon request, within thirty days. (Plan at L 13-14.) Even after payment of benefits, the Administrator has to monitor the Eligible Employee's performance of confidentiality and non-competition agreements, and must demand repayment of benefits upon any breach. (*Id.* at L 7.) The Administrator also must monitor whether an Eligible Employee accepted Comparable Employment within seventy-eight weeks of separation and therefore owes AGI repayment of benefits. (*Id.* at L 8.)

The Plan became effective March 5, 1997. (Plan at L 5.) Unless modified, the Plan was to terminate automatically December 31, 1999. (*Id.* at L 15.) Nevertheless, the Plan provides for continuing review of an Eligible Employee's Comparable Employment for seventy-eight weeks. (*Id.* at L 8.) The Plan, therefore, imposes duties on the Administrator lasting from March 1997 until at least June 2001.

4. *The AGI Plan Documents Describe It as an ERISA Plan.*

ERISA requires plans to provide claims and appeals procedures and notice of the Eligible Employees' rights under ERISA. 29 U.S.C. §§ 1024(c), 1133. The AGI Plan complies with these requirements and expressly notifies Eligible Employees that they have ERISA rights because they are participants in the AGI Plan. (*See* Plan at L 10-11, 13.) The AGI Plan also provides information of the kind required in a summary plan description, including the Plan's agent for service of process, its administrator, trustees, eligibility requirements, disqualification requirements, source of financing, and plan year. *See* 29 U.S.C. § 1022(b). (Plan at L 6-8, 11, 14-15.)

5. *Respondent Applied for Benefits Under the AGI Plan.*

In March 1998, the AGI shareholders approved a merger with Kinross Gold Company, This merger was a "Change of Control" under the Plan. The merger was accomplished June 1, 1998. Other "key employees" received benefits under the Plan. Respondent Lettes filed a claim for benefits under the AGI Plan. The Administrator denied his claim because the

Administrator determined that Respondent had been offered, and had rejected, Comparable Employment with the new company.

B. The Proceedings Below.

1. *The District Court.*

Respondent Lettes originally filed this action in Colorado state court, alleging breach of contract, promissory estoppel, and unjust enrichment. Petitioners removed the case to the United States District Court for the District of Colorado based on 28 U.S.C. §§ 1331 and 1332. On May 10, 1999, the District Court ruled that it had jurisdiction based on ERISA preemption and dismissed Respondent's state law claims. (*See* App. C.) Respondent amended his Complaint to include claims under ERISA. On January 5, 2000, the District Court granted Petitioners' Motion for Summary Judgment on the Amended Complaint. (*See* App. B.)

2. *The Court of Appeals.*

On appeal, the Tenth Circuit reversed the District Court on the issue of ERISA preemption. (*See* App. A.) Relying on this Court's ruling in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the appellate court ruled: "AGI's agreement providing for a lump-sum payment in the event of a separation after a change of control during a limited time period did not constitute an employee welfare benefit 'plan' within ERISA's ambit. Federal jurisdiction based upon § 1331 therefore must fail." (App. at 10a.) The Circuit Court remanded the case to the District Court with instructions to remand it to state court. (*Id.*)

REASONS FOR GRANTING THE WRIT

ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA buttresses these employee protections by preempting "all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA preemption is deliberately "expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (internal quotation marks omitted). By eliminating state regulation of plans, ERISA preemption subjects the entire field of "private employee benefit programs" to uniform federal regulation. 120 Cong. Rec. 29927-29928 (1974) (statement of Sen. Javits). *See also Egelhoff v. Egelhoff*, No. 99-1529, slip op. at 6 (U.S. March 21, 2001). ERISA preemption also makes "all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans . . . federal questions." *Pilot Life*, 481 U.S. at 56. *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990) (preemption applies to common law claims as well as to state statutes specifically designed to affect employee benefit plans).

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), this Court considered whether ERISA preempted a state statute that provided severance benefits to employees laid off because of plant closure. The Court concluded that ERISA did not preempt the state statute because the statute did not establish, or require an employer to establish, an administrative scheme that constituted a "plan" under ERISA. *Id.* at 16.

Since *Fort Halifax*, Circuit Courts have relied on its holding, not only to determine whether ERISA preempts state

statutes, but to determine whether ERISA preempts state common law claims for benefits under employer-sponsored benefit plans. In the case below, the Tenth Circuit relied on *Fort Halifax* to rule that ERISA does not preempt state common law claims for benefits unless the employer-sponsored plan is sufficiently complex. The Tenth Circuit's ruling thus presents questions of federal law that this Court must settle. The Tenth Circuit's ruling also conflicts with decisions of other Circuit Courts, and therefore creates a split in the application of ERISA that this Court must resolve.

I.

THE COURT SHOULD RESOLVE THE FEDERAL QUESTION CONCERNING ERISA'S COVERAGE OF EMPLOYER-SPONSORED BENEFIT PLANS.

A. The Tenth Circuit's Ruling Conflicts with ERISA's Definition of "Plan."

The Tenth Circuit held in this case that the AGI Plan is not an ERISA "plan," but rather a contract under state law. This ruling contradicts authoritative interpretations of ERISA's definition of "plan."

1. *ERISA Defines "Plan."*

ERISA's basic term "plan" refers to an "employee welfare benefit plan" or to an "employee pension benefit plan," or to a plan that is both a welfare and a pension benefit plan. 29 U.S.C. § 1002(3). ERISA further defines these terms. A welfare benefit plan is "any plan, fund, or program," "established or maintained by an employer" to the extent its

purpose is to provide, *inter alia*, "benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1). A pension benefit plan is:

> any plan, fund, or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

Congress demonstrated its intent to include arrangements like the AGI Plan in the statutory definition of "plan" by specifically exempting such arrangements from some but not all provisions of ERISA. Arrangements like the AGI Plan are known as "Top Hat" plans. A Top Hat plan is "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). ERISA expressly exempts Top Hat plans from participation and vesting, funding, and

fiduciary rules. *See* 29 U.S.C. §§ 1051(2), 1101(a)(1), 1081(a)(3). Top Hat plans are not exempt from ERISA's provisions concerning reporting and disclosure, claims and appeal procedure, or federal jurisdiction and preemption. Because Congress exempted Top Hat plans from some ERISA rules, Congress must have intended such arrangements to be "plans" under ERISA. *See Russello v. United States*, 464 U.S. 16, 22-23 (1983).

2. *The Department Of Labor Has Interpreted ERISA "Plan."*

The Department of Labor is responsible for interpreting the terms of ERISA and this Court pays deference to the Department's interpretation. 29 U.S.C. §§ 1002(13), 1135; *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989). The Department of Labor has interpreted the definitions of "plan," "welfare benefit plan," and "pension benefit plan" in light of similar definitions in the Welfare and Pension Plans Disclosure Act. *See, e.g.*, DOL Op. Letter 79-21A (1979). Applying the statutory definitions, the Department identifies five functional "elements" for an ERISA "plan":

> (1) the plan must be established or maintained by an employer or employee organization, as those terms are defined, or by both;
>
> (2) jurisdiction [exists] under the commerce clause;
>
> (3) the plan provides benefits to participants and beneficiaries as defined;

> (4) the plan provides benefits specified in the definition of "employee welfare benefit plan" or "employee pension benefit plan"; and
>
> (5) the plan is not exempt under section [1003(b)].

DOL Op. Letter 83-55A (1983). Applying these "elements of coverage," both before and after this Court's decision in *Fort Halifax*, the Department has concluded that relatively simple severance arrangements are ERISA plans. *See, e.g.*, DOL Op. Letter 80-72A (1980) (plan providing lump-sum payment of one week's wages for each year of employment is an ERISA "plan"); DOL Op. Letter 99-01A (1999) (plan lasting only six months and providing one year's salary in lump-sum or on schedule of payments is an ERISA "plan").

3. *Before Fort Halifax, the Circuit Courts Interpreted ERISA's Definition of "Plan."*

Prior to the Supreme Court's ruling in *Fort Halifax*, the Circuit Courts applied ERISA's statutory definition of "plan." Incorporating other statutory definitions, the Eleventh Circuit summarized ERISA's definition of "employee welfare benefit plan":

> a "plan, fund or program" under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.

Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982). Other Circuit Courts have applied this interpretation

of the statutory definitions to find simple severance plans to be ERISA "plans." *See, e.g., Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985) (plan providing employees terminated without cause two weeks' pay for each year of service is an ERISA "plan").

4. *Under the Statutory Definition as Interpreted by the Department of Labor and the Circuit Courts, the AGI Plan Is an ERISA Plan.*

The AGI Plan satisfies the statutory definition of "plan." Because the AGI Plan defers income beyond the termination of covered employment, it is a "pension benefit plan" "regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan." 29 U.S.C. § 1002(2)(A).[2]

The AGI Plan satisfies all of the Department's required elements for ERISA coverage. The Plan provides deferred income to Eligible Employees and is not exempt under 29 U.S.C. § 1003(b).

The AGI Plan also satisfies the *Dillingham* standards. The Plan document sets out the intended benefits, describes a class of beneficiaries, specifies that the benefits are to be paid out of general assets, and establishes procedures for filing claims and appealing adverse rulings. (Plan at L 6-13.)

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2. The AGI Plan does not satisfy 29 C.F.R. § 2510.3-2(b) because it provides for an Eligible Employee to receive more than the equivalent of two years' compensation. Therefore, the Department of Labor would not treat it as a welfare benefit plan.

5. *The Tenth Circuit Departed from Department of Labor and Circuit Court Interpretations by Determining that the AGI Plan Is Not A "Plan" under ERISA.*

The AGI Plan satisfies all the statutory and regulatory requirements for ERISA coverage. Nevertheless, the Tenth Circuit Court ruled that the Plan does not involve "a responsibility to pay benefits on a regular basis" and does not "cause periodic demands on [AGI's] assets." (App. at 9a.) Consequently, in the Circuit Court's view, ERISA does not cover the AGI Plan. Instead, the AGI Plan is a contract to be interpreted under state law. (*See id.* at 10a.)

B. The Tenth Circuit's Ruling Misapplies *Fort Halifax.*

In *Fort Halifax*, the Court considered whether ERISA preempted a state statute that mandated a severance benefit for employees upon plant closure.

1. *Fort Halifax Held that ERISA Does Not Preempt State Statutes that Do Not Require Employers to Establish Benefit Plans.*

In *Fort Halifax*, the Maine Supreme Judicial Court ruled that ERISA did not preempt the plant-closing statute because the statute did not implicate "a plan created by an employer or employee organization." *Id.* at 6. *Cf.* 29 U.S.C. § 1003 (limiting ERISA coverage to benefit plans established by employers or employee organizations). In fact, the Maine statute specifically excluded any employer-sponsored plan or labor contract providing severance pay. *Fort Halifax*, 482 U.S. at 5 n.1; *Director of Bureau of Labor Standards, et al. v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1059 (Maine

1986), *aff'd*, 482 U.S. 1 (1987). This Court reached the same result as the Maine court on a different theory. This Court held that ERISA did not preempt the Maine statute because the statute did not establish, or require an employer to establish, a benefit *plan*. *Cf.* 29 U.S.C. § 1144(a) (ERISA preempts State laws that relate to "employee benefit plans"). Compliance with the statute would require "no administrative scheme"; the employer had to do "little more than write a check." *Fort Halifax*, 482 U.S. at 12.

The Court also distinguished between "plan" and "benefits" under ERISA. The employer in *Fort Halifax* argued that ERISA would preempt any attempt by a state to create any benefit of the kinds ERISA enumerated. *Fort Halifax*, 482 U.S. at 7. This broad argument would have prevented states from providing a range of benefits for their employed citizens, including hospital benefits, unemployment benefits, day care centers, and scholarship funds. *See* 29 U.S.C. § 1002(1)(B). By distinguishing "benefits" from "plan," this Court avoided such sweeping application of ERISA preemption to state statutes.

Fort Halifax did not place a new limitation on ERISA coverage of employer-sponsored plans. In context, the Court's use of the phrase "administrative scheme" merely distinguished (a) preempted state legislation infringing on ERISA's exclusive zone of federal regulation from (b) nonpreempted state legislation affecting issues of citizen health and welfare. *See Egelhoff*, No. 99-1529, slip op at 6 (applying *Fort Halifax* to preempt a statute that "has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration"); *FMC Corp. v. Holliday*, 498 U.S. 52, 59 (1990) (citing *Fort Halifax* and noting "we have not hesitated to apply ERISA's preemption

clause to state laws that risk subjecting plan administrators to conflicting state regulation"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (noting that *Fort Halifax* limited ERISA preemption and precluded its application to statutes that "make[ ] no reference to, or indeed function[ ] irrespective of, the existence of an ERISA plan").

2. *Fort Halifax Did Not Hold that ERISA Preempts State Law Claims for Benefits Only If the Employer-Sponsored Plan is Sufficiently Complex.*

This Court did not intend *Fort Halifax* to limit ERISA preemption of state common law claims for benefits to claims brought under complex employer-sponsored plans. In *Fort Halifax* itself, the Court distinguished the state legislation at issue from the employer's death benefit plan. The Court noted that the existence of a "plan" concerning death benefits was "borne out by the fact that death benefits are included in appellant's retirement plan, with instructions on how eligibility is to be determined, benefit levels calculated, and disbursements made." *Fort Halifax*, 482 U.S. at 14 n.9. The Court did not assess the complexity of the employer's administrative scheme to determine whether the death benefits were an ERISA plan. Rather, the Court relied on factors similar to the *Dillingham* statutory factors: the specification of intended benefits, eligibility standards for beneficiaries, and procedures for making payments.

Soon after *Fort Halifax*, the Court implicitly declined to apply *Fort Halifax* to an employer-sponsored plan.[3] In

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3. In *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.2 (1992), the Court mentioned *Fort Halifax* in

(Cont'd)

Massachusetts v. Morash, 490 U.S. 107, 110 (1989), the Court considered "whether a company's policy of paying its discharged employees for their unused vacation time constitutes an 'employee welfare benefit plan.' " Even though the "administrative scheme" language of *Fort Halifax* was argued in the case below and in the Petition For Writ of Certiorari, *see Commonwealth v. Morash*, 522 N.E.2d 409, 412-13 (Mass. 1988); Pet. Writ Cert. at § II, *Massachusetts v. Morash*, 490 U.S. 107 (1989) (No. 88-32), this Court did not rely on, or even discuss, whether the arrangement had an administrative scheme that required more than the calculation of a one time lump-sum payment to each departing employee. Instead, the *Morash* Court noted that ERISA did not define "plan, fund, or program" and then followed the Department of Labor's approach by inquiring whether the vacation benefits at issue were among the employee benefits listed in section 1002(1). *Morash*, 490 U.S. at 114.

3. *The Tenth Circuit Misapplied Fort Halifax's Holding Concerning State Statutes to Limit ERISA Preemption of State Law Claims to Claims for Benefits Under Complex Employer-Sponsored Plans.*

The Tenth Circuit interpreted *Fort Halifax* to impose a threshold requirement on employer-sponsored ERISA "plans":

(Cont'd)
relation to ERISA coverage of an employer-sponsored plan. The Court noted there was no dispute as to whether the underlying arrangement was an ERISA "plan" and, in passing, described *Fort Halifax* as "constru[ing] the word 'plan' to connote some minimal, ongoing 'administrative' scheme or practice." *Id.*

> Although an agreement to pay severance benefits may constitute an employee welfare plan subject to ERISA's regulation, the agreement is subject to ERISA's control only if it creates benefits requiring "an *ongoing* administrative program to meet the employer's obligation." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (emphasis added [by Circuit Court]). To further explain the meaning of the term "ongoing," the Court held that, if under the agreement, the employer has not assumed a responsibility to process claims and pay benefits "on a regular basis," it "faces no periodic demands on its assets that create a need for financial coordination and control," and a benefit plan subject to ERISA has not been established.

(App. at 6a [emphasis in original].)

Applying its understanding of *Fort Halifax*, the Tenth Circuit determined that the AGI Plan does not have a sufficiently complex administrative scheme. The AGI Plan provides for "a lump-sum payment in the event of a separation after a change of control during a limited time period." (App at 10a.) Consequently, according to the Tenth Circuit, the AGI Plan is not an ERISA "plan," and ERISA does not preempt Respondent's state common law claims.

This holding was in error, even based on the facts cited by the Tenth Circuit. The Tenth Circuit expressly noted that the Plan required a determination of the reason for each Eligible Employee's Separation from Service within twelve months of a "Change of Control." (App at 3a.) Thus on the Tenth Circuit's own understanding of the facts of this case,

the AGI Plan required more than the simple signing of a check. *Cf. Fort Halifax*, 482 U.S. at 12. The Plan required an Administrator to review the circumstances of the Eligible Employees on a case-by-case basis over at least twelve months.

Moreover, the Tenth Circuit took the *Fort Halifax* language out of context. Respondent's state common law claims for benefits under the AGI Plan do not involve a state statute or the administrative burden a state imposes on an employer. The current case involves only whether an Eligible Employee is entitled to benefits under the administrative structure the employer itself created to provide benefits. As noted above, ERISA covers such pension benefit plans "regardless of . . . the method of distributing benefits from the plan." 29 U.S.C. § 1002(2)(A).

C. The Tenth Circuit's Ruling Eliminates ERISA's Protections for Employees.

Congress designed ERISA to protect employees' interests in benefit plans. *Shaw*, 463 U.S. at 90. The statutory protections include requirements that participants receive notice of available plans and that plans provide claims and appeal procedures. Courts have read ERISA's definition of "plan" broadly to enhance these protections. *See, e.g., Blau v. Del Monte Corp*, 748 F.2d 1348, 1352 (9th Cir. 1985) (finding ERISA "plan" even though employer kept the plan secret and included no claim or appeal procedures). The Tenth Circuit's ruling below limits ERISA's definition of "plan" and permits employers to evade the statutory protections. Under the Tenth Circuit's ruling, plans offering lump-sum benefits are not within ERISA's ambit. Consequently, employers may design plans to offer only

lump-sum benefits, and thereby avoid any duty to inform participants of the available benefits or of how to claim those benefits. Employers then may choose for themselves whether to pay benefits to otherwise qualifying participants. The Tenth Circuit's ruling effectively eliminates ERISA's protections for employees.

II.

THIS COURT SHOULD RESOLVE CONFLICTS AMONG THE CIRCUIT COURTS CONCERNING THE APPLICATION OF *FORT HALIFAX* TO EMPLOYER-SPONSORED PLANS.

Even assuming that this Court intended *Fort Halifax* to limit ERISA coverage of employer-sponsored employee benefit plans, *Fort Halifax* left the Circuit Courts without guidance on the degree of complexity an administrative scheme must exhibit for a benefit plan to be a "plan" under ERISA. Trying to apply *Fort Halifax* to employer-sponsored plans, the Circuit Courts have developed conflicting standards and have come to conflicting conclusions about similar plans. This Court should resolve these conflicts among the Circuit Courts.

A. The Circuit Courts Conflict Over the Appropriate Standard under *Fort Halifax* for Employer-Sponsored ERISA "Plans."

Fort Halifax held that the "one-time, lump sum payment triggered by a single event" created by state statute is not a sufficient administrative scheme to allow ERISA preemption. 482 U.S. at 12. This lean standard has provided no guidance on what level of administrative complexity would be

sufficient for an employer-sponsored plan. *See Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996) ("deciding what is not an ongoing administrative program does not aid our determination of which obligations are complex enough to require such a program"); *Belanger v. Wyman-Gordan Co.*, 71 F.3d 451, 454 (1st Cir. 1995) ("making particularized judgments in this area on the basis of vague etchings of policy is no mean feat").

Relying heavily on the specific facts of cases decided after *Fort Halifax*, the Circuit Courts have developed conflicting standards for ERISA "plans." The District of Columbia Circuit asserts that "an employee benefit may be considered a plan for purposes of ERISA only if it involves the undertaking of continuing administrative and financial obligations by the employer to the behoof of employees or their beneficiaries." *Young v. Washington Gas Light Co.*, 206 F.3d 1200, 1203 (D.C. Cir. 2000) (internal quotation marks and citations omitted).

The First Circuit finds employer-sponsored plans to be sufficiently complex based on two "important considerations":

> we will be inclined to find a plan where there are elements that "involve administrative activity potentially subject to employer abuse" . . . . Similarly, whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits" is an important consideration.

New England Mut. Life Ins. Co. v. Baig, 166 F.3d 1, 4 (1st Cir. 1999) (internal citations omitted).

The Second Circuit describes a "variety of factors" to consider:

> Whether the employer's undertaking or obligation requires managerial discretion in its administration; whether a reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits; and whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria.

Schonholz, 87 F.3d at 76 (internal quotation marks and citations omitted).

The Third, Seventh, and Ninth Circuits have adopted a standard relying on individualized decision-making: "the fence between cases involving real ERISA plans and cases such as *Fort Halifax* [is] . . . whether the plan in question requires an administrative scheme because the circumstances of each employee's termination have to be analyzed in light of certain criteria." *Bogue v. AMPEX Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992) (internal quotations and alterations omitted). *See Pane v. RCA Corp.*, 667 F. Supp. 168, 170 (D.N.J. 1987) (an "ongoing administrative scheme" exists under *Fort Halifax* if "the employer made a separate analysis of each employee's eligibility for benefits and schedule of payments"), *aff'd*, 868 F.2d 631 (3d Cir. 1989); *Cvelbar v. CBI Illinois Inc.*, 106 F.3d 1368, 1374-75 (7th Cir. 1997) (" 'pivotal inquiry' " includes whether the administrator " 'must analyze each employee's particular circumstances in light of the appropriate criteria' " in order to " 'determine the employees' eligibility for and level of benefits' ") (quoting *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 257 (8th Cir. 1994)).

Other Circuit Courts have continued to rely on the *Dillingham* factors, but incorporate the *Fort Halifax* language as part of *Dillingham*'s "procedures for receiving benefits." *See Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623, 629 (8th Cir. 2001); *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991).[4]

The Tenth Circuit, in contrast, has appended the *Fort Halifax* requirement to the *Dillingham* requirements:

> A plan, fund, or program exists if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and the procedures for receiving benefits. Additionally, in order to fit within ERISA, the plan must implicate benefits "whose provision by nature requires an ongoing administrative program to meet the employer's obligation." *Fort Halifax*, 482 U.S. at 11 . . . .

Siemon v. AT&T Corp., 117 F.3d 1173, 1178 (10th Cir. 1997) (internal quotation marks and citations omitted). In the current case, the Tenth Circuit focused on the requirement that the administrative scheme be "ongoing." (App. at 6a, 10a.)

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4. Circuit Courts sometimes ignore *Fort Halifax* altogether and simply rely on *Dillingham* when determining whether an employer-sponsored arrangement is an ERISA "plan." *See, e.g., Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 239-40 (5th Cir. 1990); *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 417 (4th Cir. 1993). *See also Williams v. WCI Steel Co.*, 170 F.3d 598, 604 (6th Cir. 1999) (distinguishing *Fort Halifax* as concerning preemption, not plan qualification).

B. The Circuit Courts Conflict Over Whether Employer-Sponsored Plans Similar to the AGI Plan Are ERISA "Plans."

The AGI Plan at issue in this case provides severance benefits over a limited period of time for a few key employees, if the Administrator in its discretion determines the Eligible Employee experienced a "Separation from Service" due to a "Change in Control" and the employee was not offered "Comparable Employment." The Tenth Circuit determined this program did not involve an administrative scheme sufficient to qualify as an ERISA "plan." Other Circuit Courts have considered programs similar to the AGI Plan and have ruled that they *are* ERISA plans.

In *Bogue v. AMPEX Corp.*, 976 F.2d 1319, 1322 (9th Cir. 1992), the Ninth Circuit considered a plan that existed for less than two years, provided severance benefits for ten executives, applied only upon the sale of the employer, provided benefits only if the employees were not offered "substantially equivalent" employment with the current employer or a successor, provided for discretionary decision-making by the Administrator, and provided only a lump-sum benefit. Applying *Fort Halifax*, the Ninth Circuit determined that the plan did include a sufficient administrative scheme to make it an ERISA "plan." *Id.* at 1323.

In *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 74 (2d Cir. 1996), the Second Circuit considered a plan that provided payments to "senior-level employees upon their involuntary discharge," if the employees' discharge was not for illegal conduct or deficient performance, and if the employees continued to make "a reasonable and good faith

effort" to obtain a commensurate position. The Second Circuit noted *Fort Halifax*'s requirement of an "administrative program," and ruled the plan was subject to ERISA, *inter alia*, because it "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria." *Id.*

In *Collins v. Ralston Purina Co.*, 147 F.3d 592 (7th Cir. 1998), the Seventh Circuit considered a set of individual agreements between an employer and key employees. The agreements were in force for just over a year. They provided for lump-sum benefits if the employer was sold and the buyer substantially reduced the employee's duties or responsibilities, failed to offer existing or substantially similar employee benefits, or transferred the employee outside the metropolitan South Bend, Indiana area. *Id.* at 594. The Seventh Circuit noted that the agreements required the employer "to budget for the prospect of paying out disbursements of varying amounts to its managers and at varying times." *Id.* at 595-96. The court also noted that, to determine whether the purchaser "substantially reduced" job responsibilities, the employer would have to compare the previous and the newly offered job duties, would have to consult records, and would have to apply consistent standards. *Id.* at 596.

> Only an ongoing administrative scheme would allow the company to develop a working definition of "substantial reduction of duties or responsibilities," such that it could be consistently applied either to a single employee on multiple occasions or multiple employees on multiple occasions. It is exactly this prospect of

> multiplicity and record-keeping that distinguishes Collins' case from the one-time, routine disbursement facing the Court in *Fort Halifax*.

Id.

The AGI Plan has the same features as these cases. Nevertheless, relying on the same language in *Fort Halifax*, the other Circuit Courts reached positions inconsistent with that of the Tenth Circuit.

C. The Circuit Courts' Conflicts over the Appropriate Standard and over Plans Similar to the AGI Plan Subject ERISA Plans to Divergent State and Federal Law.

One purpose of ERISA preemption is to prevent employee benefit plans from being subject to state law claims and remedies. *See Pilot Life*, 481 U.S. at 56; *Ingersoll-Rand*, 498 U.S. at 139-40. As this Court has noted, employers might react to being subject to diverse state and federal governing law by reducing benefits or refraining from offering benefits. *Fort Halifax*, 482 U.S. at 11. Applying inconsistent standards, the Tenth Circuit has found the AGI Plan to be subject to state law contract claims, while the Second, Seventh, and Ninth Circuits found similar severance pay programs to be "plans" subject only to federal claims under ERISA. Unless this Court addresses these conflicts among the Circuit Courts, many employers' severance plans for key employees will be subject to federal law in some states and state law in other states. This situation is "fundamentally at odds with the goal of uniformity that Congress sought to implement." *Ingersoll-Rand*, 498 U.S. at 142.

CONCLUSION

Under the Tenth Circuit's application of *Fort Halifax* to employer-sponsored plans, ERISA is unable to impose employee protections on simple welfare and pension benefit plans. In addition, employers who offer similar, simple employee benefit plans will be subject to state law in some areas of the country and federal law elsewhere. This Court should grant this Petition to clarify the application of *Fort Halifax* to employer-sponsored plans and to restore ERISA's uniform regulation of private employee benefit programs.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JANUARY 23, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-1057
(D.C. No. 98-S-1899)
(D. Colo.)

MARK LETTES,

Plaintiff-Appellant,

v.

KINAM GOLD INC., a Delaware Corporation, formerly known as Amax Gold, Inc.; AMAX GOLD, INC., SEPARATION PLAN FOR KEY EMPLOYEES; AMAX GOLD, INC., BENEFITS COMMITTEE; KINROSS GOLD CORPORATION BENEFITS COMMITTEE; KINROSS GOLD CORPORATION,

Defendants-Appellees.

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

Before **BALDOCK**, **ANDERSON**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Mark Lettes appeals from an order dismissing his state law claims against appellees as preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (ERISA) but allowing amendment of his complaint to allege ERISA violations. He also appeals from a second order granting summary judgment in favor of appellees on the ERISA claims. Our jurisdiction arises under 28 U.S.C. § 1291, and we reverse and remand with instructions to remand to state court.

I. Background facts and proceedings

The relevant facts are undisputed. Mr. Lettes was employed by AMAX Gold, Inc. (AGI) as a "key employee." In 1997, in anticipation of a pending merger with Kinross Gold Corporation, AGI adopted a "Separation Plan for Key Employees" (the plan) that provided an additional, one-time "golden parachute" monetary payment apart from, and independent of (but reduced by any amount paid under), the company's general severance plan. Appellant's App. at 689-705. The additional payment became owing upon a key employee's separation from service after a "change of control" as defined in the plan, *id.* at 694, and the plan

automatically terminated at the close of business on December 31, 1999. *Id.* at 703. Nine key employees were eligible to participate in the plan. *Id.* at 115. AGI named itself as the administrator of the plan and initially delegated its duties under the plan to its benefits committee consisting of three members. Two of those members were eligible key employees. *See id.* at 699-700; 115-16. The committee, in turn, appointed another AGI employee as plan administrator. *Id.* at 116.

Just before the merger agreement was executed, in February 1998 the plan was amended to redefine the meaning of "Separation from Service" to include termination without cause within twelve months of the merger or by the eligible employee quitting for "Good Reason." *Id.* at 740. The amendment added definitions for "Cause"[1] and "Good Reason,"[2] *id.* at 740-41, and omitted the former requirement that, in order to receive the golden parachute, the eligible employee also had to meet the terms and conditions of the general severance plan, *id.* at 741, 694. The plan further

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1. The plan defined "Cause" as "(i) substantial and continued failure by the Eligible Employee to perform his services and duties to the Company . . . (ii) any act of fraud or embezzlement against the Company . . . or (iii) the conviction, or pleading guilty or no contest, to a felony." Appellant's App. at 740.

2. The plan defined "Good Reason" to mean "any of the following events: (i) material reduction in the Eligible Employee's compensation, benefits, title or duties, or (ii) a change in the Eligible Employee's principal place of employment which is more than 35 miles away from the Eligible Employee's pre-Change of Control place of employment, and more than 35 miles away from the Eligible Employee's primary residence." Appellant's App. at 741.

provided that an eligible employee was not entitled to benefits if he had been offered "Comparable Employment," as defined by the plan, by AGI or its successor. Finally, the plan specifically limited benefits to eligible employees who had performed their job assignments satisfactorily and to the best of their ability before separation; who had abided by the terms of confidentiality and noncompetition agreements; and who had executed a general release of claims in a form AGI prescribed. *Id.* at 695. Thus, under the express terms of the plan, an eligible employee was entitled to receive golden parachute benefits after separation from service unless he had been terminated with cause, as defined by the plan, or quit without good reason, as defined by the plan, as long as he also complied with prior agreements with the company and signed the release.

The plan provided a formula for benefit based on the employee's salary grade and target bonus. *Id.* at 696-99. Upon merger with Kinross in June 1998, golden parachute benefits were automatically paid without separate request or action of the benefit committee to seven of the nine "key employees." *See id.* at 117. One key employee apparently resigned and accepted a job with another company before the change of control. *Id.* Thus, Mr. Lettes was the only key employee in June 1998 who had not already been paid the severance benefit.

Before the merger, Mr. Lettes was offered a position at Kinross that AGI and Kinross believed to be "comparable employment" as defined by the plan. Mr. Lettes disagreed, arguing that the proffered job did not provide him with the

same level of autonomy, duties, or potential compensation. He requested, but AGI and then Kinross denied, the golden parachute benefits under the separation plan.

Mr. Lettes brought suit in Colorado state court, claiming that the appellees unlawfully refused to pay separation benefits to which he was entitled. Appellees removed the case to federal court under 28 U.S.C. § 1331, alleging federal question jurisdiction under ERISA. The district court then granted appellees' motion to dismiss Mr. Lettes' state law claims as preempted by ERISA. Because federal jurisdiction rests on whether ERISA controls the plan, we must answer that question first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

II. Discussion

"[C]ommon law tort and breach of contract claims are preempted by ERISA if the factual basis of the cause of action involves an employee benefit plan." *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1121 (10th Cir. 1995) (quotation omitted). We review *de novo* the district court's preliminary determination that ERISA preempted Mr. Lettes' state law claims. *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995).

"ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). "To that end, it established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit

would be defeated through poor management by the plan administrator." *Id.* at 115. Although an agreement to pay severance benefits may constitute an employee welfare benefit plan subject to ERISA's regulation, the agreement is subject to ERISA's control only if it creates benefits requiring "an *ongoing* administrative program to meet the employer's obligation." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (emphasis added). To further explain the meaning of the term "ongoing," the Court held that, if under the agreement, the employer has not assumed a responsibility to process claims and pay benefits "on a regular basis," it "faces no periodic demands on its assets that create a need for financial coordination and control," and a benefit plan subject to ERISA has not been established. *Id.* at 12. The Court in *Fort Halifax* found that a statute requiring employers to pay as severance a "one-time, lump-sum payment triggered by a single event" did not create a benefit plan subject to ERISA's control. *Id.*

In *Siemon v. AT&T Corp.*, we stated that the *Fort Halifax* decision was primarily based on the fact that "only a one-time event would trigger the payment," noting that the Court distinguished the severance benefit from death payment benefit plans that create an ongoing need for an administrative scheme to process claims and pay out benefits. 117 F.3d 1173, 1178 (10th Cir. 1997). Thus, we have decided that the hallmarks of an ERISA plan are whether the plan pays benefits triggered by several events, as opposed to a one-time event, and whether it requires regular periodic payments.

The district court in this case concluded that the language giving the plan administrator "complete and discretionary

authority to construe and interpret the Plan, correct defects, supply omissions, and reconcile inconsistencies and ambiguities in and with respect to the Plan" also gave the administrator significant discretion in deciding whether a change of control had occurred, whether eligible employees were entitled to benefits, whether eligible employees had been offered comparable employment, and whether they had performed their jobs satisfactorily and had abided by the terms of all agreements after separation.[3] Appellant's App. at 228 (quotation omitted). Citing a Second Circuit case and focusing on its conclusion that "the making of severance payments . . . requires the 'exercise of managerial discretion,' " the court concluded that "sufficient indicia of an ongoing administrative scheme to be governed by ERISA" therefore existed. *Id.* (citing *James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463, 468 (2d Cir. 1993)). Apparently, the district court found the key factor to be considered was whether a plan required a " 'case-by-case, discretionary application of its terms.' " *Id.* at 229 (quoting *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992)). We read our precedent, however, to require consideration of additional factors.

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3. Although the plan administrator had discretion to interpret ambiguities in the plan, the language setting out eligibility requirements was explicit and absolute, thus significantly limiting the administrator's discretion. The plan set out four specific components for the administrator to use in determining whether an eligible employee had good reason to refuse an offer of employment: "material reduction" in either compensation, benefits, title, or duties. Appellant's App. at 435. The administrator's only discretion lay in determining whether a reduction in any of those four areas was "material."

Appendix A

In *Bogue*, the court found an "ongoing" scheme to exist solely because the administrator had discretion in determining eligibility. There, a limited severance program similar to the one in the case at bar was created for several executives if they were not offered "substantially equivalent" employment after a merger. 976 F.2d at 1321. The employer argued that discretionary decision making was the "hallmark of an ERISA plan," and the court agreed. *Id.* at 1322. The *Bogue* court stated that it chose to follow the approach of *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989), and *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992), in determining what constitutes an ERISA plan. 976 F.2d at 1323.

We conclude, however, that the cases *Bogue* relied upon poorly support its analysis. For example, the plaintiff in *Pane* based federal jurisdiction on ERISA but then argued that ERISA did not preempt his state law claims, which is an inconsistent stance. *Pane*, 868 F.2d at 634-35. Without analysis, the court stated only that *Fort Halifax* "suggests" that the plan at bar was an ERISA plan because it required an administrative scheme. *Id.* at 635.

Bogue further proposed that the *Fontenot* court based ERISA control on whether "the circumstances of each employee's termination [had] to be analyzed in light of certain criteria." 976 F.2d at 1323 (quotations omitted). Our review of *Fontenot* leads to a different conclusion. In *Fontenot*, the plaintiff asserted that the golden parachute plan at issue was an ERISA plan, apparently arguing that *all* employee benefits requiring administrative schemes are ERISA plans and relying on *Pane v. RCA Corp.*, 667 F. Supp.

168 (D.N.J. 1987), *aff'd* 868 F.2d 631 (3d Cir. 1989). *See Fontenot*, 953 F.2d. at 962-63. *Fontenot* distinguished *Pane* by noting that the plan in its case required no administrative scheme whatsoever and stated only that *Pane* did not stand for the proposition that every golden parachute is an ERISA plan. *Id.* at 963. The *Fontenot* court did not, as *Bogue* suggests, hold that the hallmark of an ERISA plan is whether an individualized discretionary eligibility decision must be made by a plan administrator, although that factor entered into the court's analysis.

Whether a plan administrator has discretion in determining eligibility for benefits may be one factor to be considered in deciding whether an administrative scheme for processing claims is necessary, but it says nothing about whether the plan is sufficiently "ongoing" to trigger ERISA regulation. The fact that an administrator has even unfettered discretion in determining eligibility for benefits does not mean that the employer has assumed a "responsibility to pay benefits on a regular basis," thus causing it to face "periodic demands on its assets that create a need for financial coordination and control." *Fort Halifax*, 482 U.S. at 12.

The district court focused on AGI's discretion in determining eligibility without examining whether the benefit also necessitated an ongoing scheme to coordinate and control monies that would fund the regular distribution of payments, as required by *Siemon*. *See* 117 F.3d at 1178-79 (noting that focus of *Fort Halifax* decision was the one-time event that triggered single payment); *see also Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 454 (1st Cir. 1995) (stating that "an employee benefit may be considered a plan

for purposes of ERISA only if it involves the undertaking of continuing *administrative and financial obligations* by the employer") (emphasis added).

The golden parachute agreement in this case was unfunded, contingent on a one-time event that might never happen, and expressly limited to a narrow time period. It involved only nine specific employees and the benefit was to be paid in a lump sum based on a mathematical formula. Although there are factual differences between the statutorily-required severance payments in *Fort Halifax* and the supplemental severance payments that AGI proposed to make to its key employees, the reasoning of *Fort Halifax* is equally applicable to the present case and requires the same conclusion: AGI's agreement providing for a lump-sum payment in the event of a separation after a change of control during a limited time period did not constitute an employee welfare benefit "plan" within ERISA's ambit. Federal jurisdiction based upon § 1331 therefore must fail.

The judgment of the United States District Court for the District of Colorado is REVERSED. The order dismissing Mr. Lettes' state law claims is reversed. ERISA preemption is the sole basis of federal jurisdiction in this case. Therefore, the order granting summary judgment on the ERISA claims is vacated, and we remand with instructions to remand the case to state court.

Entered for the Court

Robert H. Henry
Circuit Judge

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED JANUARY 5, 2000 AND FILED JANUARY 6, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 98-S-1899

MARK LETTES,

Plaintiff,

v.

KINAM GOLD, INC., a Delaware corporation f/k/a AMAX GOLD, INC., a Delaware corporation; AMAX GOLD, INC. SEPARATION PLAN FOR KEY EMPLOYEES; AMAX GOLD, INC. BENEFITS COMMITTEE; KINROSS GOLD CORPORATION BENEFITS COMMITTEE; and KINROSS GOLD CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on Defendants' Motion for Summary Judgment (filed July 1, 1999). The court has reviewed the motion, Plaintiff's Brief in Opposition (filed August 13, 1999), Defendants' Reply (filed September 10, 1999), the affidavits, the numerous exhibits, the entire

case file, and the applicable law and is sufficiently advised in the premises. The court has determined that oral argument will not materially assist resolution of the motion.

I. Standard of Review on Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). The movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim. *Celotex*, 477 U.S. at 325; *John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 503 (10th Cir. 1994); *Universal Money Ctrs., Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 513 U.S. 1052 (1994). If the moving party meets this burden, the non-moving party may not rest upon its pleadings, but must come forward with specific facts showing that there is a genuine issue for trial as to the elements essential to the non-moving party's case. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Applied Genetics Intern. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The court must construe the

factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 851 (10th Cir. 1996). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

II. Background

Plaintiff's Amended Complaint (filed June 1, 1999) asserts two claims for relief: (1) his First Claim for Relief pursuant to 29 U.S.C. § 1132(a)(1)(B) for recovery of benefits under the AMAX Gold, Inc. Separation Plan for Key Employees ("the Plan") (Exhibit A to Amended Complaint); and (2) his Second Claim for Relief pursuant to 29 U.S.C. § 1109 for breach of fiduciary duties. Plaintiff alleges that the Defendants' decision that he was not entitled to benefits under the Plan was "arbitrary, capricious, and an abuse of discretion" and that the Plan Administrator breached its fiduciary duties owed to him. (Amended Complaint ¶¶ 41, 48-49).

Plaintiff was an employee of Amax, Inc. and then Amax Gold, Inc. ("AGI") from September of 1979 to June 1, 1998. As a "key employee," Plaintiff was an eligible employee under the Plan. The Plan contained provisions for severance pay for eligible key employees "under certain limited circumstances." (Exhibit A to Amended Complaint p. 1). Article II § 2.1. (a) of the Plan provided:

> an Eligible Employee who incurs a Separation from Service and meets the terms and conditions of the Severance Plan for a benefit payment due to a 'change of control,' as such term is defined in the Severance Plan, shall be eligible to receive Benefits.

(Exhibit A to Amended Complaint p. 4). Article II § 2.1.(b) of the Plan provided that an eligible employee would *not* be entitled to benefits under the Plan if AGI, Cyprus Amax Minerals Co. ("Cyprus") (the parent company of AGI), or a successor offered the eligible employee "comparable employment" after a "change of control," "regardless whether the Eligible Employee accepts such offer." (Exhibit A to Amended Complaint pp. 4-5).

In March of 1998, the AGI shareholders approved a merger with Kinross Gold Corporation ("Kinross"). AGI and Kinross closed the merger agreement on June 1, 1998. It is undisputed that the merger constituted a "change of control" under the Plan. Plaintiff alleges that, after the change of control, he was not offered reasonably comparable employment as defined by the Plan, and therefore he became entitled to severance benefits pursuant to the terms of the Plan. Defendants have denied such benefits.

III. Standard of Review for Denial of ERISA Benefits

The court has previously determined and the parties agree that the Plan is governed by ERISA. (May 10, 1999 Memorandum Opinion and Order, Exhibit K to Motion for Summary Judgment; *see also* Exhibit A to Amended

Complaint § 3.5. pp. 11-12). Title 29 U.S.C. § 1132 provides the exclusive remedy for the failure to obtain benefits from an ERISA plan. *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479, 1483 (10th Cir. 1992).

A denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) is reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan representative, administrator, or fiduciary is entitled to exercise such discretion, then judicial review of the challenged denial of benefits is limited to a determination of whether the decision is arbitrary or capricious. *Kimber v. Thiokol Corp.*, __ F.3d __, 1999 WL 1020834 at *3 (10th Cir. (Utah) Nov. 10, 1999); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1159 (10th Cir. 1998); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996); *Arfsten v. Frontier Airlines, Inc. Retirement Plan for Pilots*, 967 F.2d 438, 440 (10th Cir. 1992); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991); *Pratt v. Petroleum Production Management Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990); *Torix v. Ball Corp.*, 862 F.2d 1428, 1429 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 895 (10th Cir. 1988); *Naugle v. O'Connell*, 833 F.2d 1391, 1393 (10th Cir. 1987); *Peckham v. Board of Trustees of Intern. Broth. of Painters and Allied Trades Union & Industry Nat. Pension Fund*, 719 F.2d 1063, 1066 (10th Cir. 1983).

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Plaintiff concedes that the standard of judicial review for the challenged denial of benefits is whether the decision is arbitrary or capricious. However, Plaintiff argues that the plan administrator was operating under a conflict of interest and, therefore, the court should grant less deference to his decision. *See Chambers*, 100 F.3d at 825 (noting that a conflict of interest "triggers a less deferential standard of review.").

> A conflict of interest can arise between a plan administrator's duty to act 'solely in the interest of the participants and beneficiaries' of the plan, 29 U.S.C. § 1104(a)(1), and his self interest or loyalty to his employer. In *Firestone*, the Supreme Court noted that 'if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." ' *Firestone*, 489 U.S. at 115 (citation omitted). The standard always remains arbitrary and capricious but the amount of deference present may decrease 'on a sliding scale in proportion to the extent of conflict present, recognizing the arbitrary and capricious standard is inherently flexible.' *McGraw v. Prudential Ins. Co.*, 137 F.3d 1253, 1258 (10th Cir. 1998) (citing *Chambers*, 100 F.3d at 826-27).

Kimber, 1999 WL 1020834 at *4.

Before the court may apply a decreased amount of deference based on a conflict of interest, there must first be

evidence of a conflict of interest, i.e. proof "that the plan administrator's dual role jeopardized his impartiality." *Kimber*, 1999 WL 1028034 at * 4 (quoting *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999)). Plaintiff advances two arguments in support of his assertion of a conflict of interest. First, "the plan is unfunded." (Plaintiff's Brief in Opposition to Motion for Summary Judgment p. 17). Second, "both Chris Crowl and Allan Schoening were responsible for human resources for their respective employers." *Id.*

Chris Crowl was the plan administrator for AGI until the merger on June 1, 1998. (Crowl Deposition pp. 13-14; Exhibit 2 p. 21; Exhibit 4 p. 39). Prior to June 1, 1998, Crowl had determined that Plaintiff was not entitled to severance benefits. (Exhibit 4 p. 38; Lettes Deposition pp. 148-49). Allan D. Schoening was hired as Vice President of Human Resources and Community Affairs for Kinross on July 1, 1998. Schoening was appointed as the plan administrator for Kinross on November 12, 1998. (Exhibit J). Schoening reviewed and, on November 19, 1998, denied Plaintiff's second request for severance benefits. (Schoening Deposition pp. 6-7, 9; Exhibit 19; Exhibit 1 ¶ 26).

The mere fact that a plan administrator was an employee of the company is not enough *per se* to demonstrate a conflict of interest. *Kimber*, 1999 WL 1028034 at * 4 (citations omitted). In determining whether or not a conflict of interest existed, a court should consider various factors including whether:

> (1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator's performance reviews or level of compensation were linked to the denial of the benefits; and (4) the provision of benefits had a significant economic impact on the company administering the plan.

Kimber, 1999 WL 1028034 at * 4.

Here, the first factor appears to be present. However, while Chris Crowl was the plan administrator for AGI until the merger on June 1, 1998, the evidence demonstrates that Crowl was never an employee of AGI. (Crowl Deposition pp. 5, 13-14). And, while Schoening was an employee of Kinross, neither his compensation nor his performance reviews were in any way related to the denial of benefits. (Exhibit M ¶ 4). Moreover, a payment of benefits to Plaintiff under the AGI Plan would not have had a significant economic impact on Kinross. (Exhibit M ¶ 4). After considering the relevant factors, the court finds that there is insufficient evidence of a conflict of interest and that review with deference is appropriate.

IV. Analysis of Denial of Benefits

A decision to deny benefits is arbitrary and capricious if it is not a reasonable interpretation of the plan's terms. *McGraw*, 137 F.3d at 1259; *see also Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984-86 (6th Cir. 1991); *Torix*, 862 F.2d at 1429; *Naugle*, 833 F.2d at 1393-94. Indicia of

arbitrary and capricious conduct include lack of substantial evidence, mistake of law, bad faith, and conflict of interest. *Sandoval v. Aetna Life and Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992). When reviewing a denial of benefits under the arbitrary and capricious standard, the court may consider only the evidence available to the claims administrator at the time the final decision was made. *Miller*, 925 F.2d at 986; *Perry v. Simplicity Engineering*, 900 F.2d 963, 966 (6th Cir. 1990); *Voliva v. Seafarers Pension Plan*, 858 F.2d 195, 196 (4th Cir. 1988).

> When reviewing under the arbitrary and capricious standard, '[t]he Administrator['s] decision need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within [his] knowledge to counter a claim that it was arbitrary and capricious.' *Woolsey*, 934 F.2d at 1460. The decision will be upheld unless it is 'not grounded on *any* reasonable basis.' *Id.* (citation omitted). The reviewing court 'need only assure that the administrator's decision fall[s] somewhere on a continuum of reasonableness — even if on the low end.' *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287, 297 (5th Cir. 1999).

Kimber, 1999 WL 1028034 at * 5 (emphasis in original).

Plaintiff asserts that Defendants arbitrarily and capriciously denied him severance benefits under the Plan, as evidenced by Defendants' failure to comply with procedural requirements provided by the Plan and 29 C.F.R.

§ 2560.503-1, coupled with Defendants' failure to offer Plaintiff comparable employment. (Plaintiff's Brief in Opposition pp. 9-10, 20).

1. Comparable Employment

In 1994, Plaintiff was promoted to Chief Financial Officer (CFO) of AGI. (Lettes Affidavit ¶ 4). As part of his duties as CFO, Plaintiff was responsible for the trading and hedging program, by which AGI bought and sold commodities such as gold, silver, energy, and interest rates through the use of derivatives and securities in order to maximize prices and minimize the risk of falling prices. (Lettes Affidavit ¶ 5, 7; Exhibit 2 pp. 39-40). In 1997, Plaintiff's position was changed to vice president of trading and he became responsible for the entire trading and hedging program. (Lettes Deposition p. 30, Lettes Affidavit ¶ 10; Exhibit 2 p. 29).

Plaintiff knew that AGI and Kinross signed a merger agreement in February of 1998 and that the majority shareholder approved the merger agreement in March of 1998 (Exhibit 15). During the merger transition period, Plaintiff discussed his potential future employment at Kinross with Robert Buchan, Chairman and Chief Executive Officer (CEO) of Kinross. (Lettes Affidavit ¶ 17; Buchan Deposition p. 15). In approximately April of 1998, Kinross made Plaintiff an oral offer of employment, indicating that "the offer was to fulfill [Plaintiff's] needs and allow him to do what he had done effectively for AGI at Kinross." (Exhibit 5 p. 17). On May 4, 1998, Kinross made Plaintiff a preliminary offer in writing. (Buchan Deposition p. 21;

Exhibit F; Exhibit 5 p. 17). Kinross offered Plaintiff employment "as Vice President, with essentially the same duties and responsibilities as you have had with Amax." (Exhibit F). On May 5, 1998, Plaintiff wrote a memo to Scott Shellhaas, President of AGI, indicating that he was rejecting Kinross' offer. (Exhibit G). On May 8, 1998, Plaintiff wrote a memo to Buchan rejecting Kinross' offer. (Exhibit I).

Plaintiff argues that because he was not offered comparable employment by Kinross, he was entitled to severance benefits under the Plan. Defendants denied Plaintiff severance benefits on the grounds that Kinross had offered Plaintiff comparable employment and therefore, pursuant to § 2.1.(b) of the Plan, Plaintiff was not entitled to severance benefits.

ERISA benefits are determined by reference to the plan. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-14 (1981). ERISA mandates no minimum substantive content for employee welfare benefit plans; rather, the private parties creating the plans control the level of benefits to be provided. *Alessi*, 451 U.S. at 511; *Ryan by Capria-Ryan v. Federal Express Corp.*, 78 F.3d 123, 126 (3d Cir. 1996). Section 1.1. of the Plan defines "comparable employment" as:

> the employment of an Eligible Employee by an employer in a position that (a) is reasonably comparable without substantial diminution of duties to the position the Eligible Employee held immediately prior to the Change of Control, (b) pays substantially the same Compensation, and (c) is entitled to participate in an incentive

> plan at substantially the same long-term incentive award level in effect for the Eligible Employee immediately prior to the Change of Control.

(Exhibit A to Amended Complaint p. 3).

Since the time he learned of the merger and the severance benefits provisions of the Plan, Plaintiff has prepared and asserted a litany of reasons why Kinross' job offer was not sufficiently comparable employment and he is entitled to severance benefits. Plaintiff's primary concerns were that: (1) the Kinross job would be "truly comparable" only if he could report to the CEO, Buchan, rather than the CFO, Brian Penny; (2) his increased salary would not make up for other losses in compensation; and (3) he would be required to move to Toronto, Canada. (Exhibit G; Exhibit 1 ¶¶ 21, 22; Lettes Deposition pp. 98-99; Exhibit I (May 5, 1998 memo from Shellhaas); Exhibit I (at handwritten p. 12); Exhibit I (April 29, 1998 memo from Shellhaas); Exhibit 1 ¶ 18).

The court need not decide whether Plaintiff's subjective perception of Kinross' job offer was reasonable. (*See i.e.*, Ward Deposition p. 69; Lettes Deposition p. 147). The court need only determine whether Defendants' decision regarding Plaintiff's entitlement to severance benefits was grounded on any reasonable basis. *Woolsey*, 934 F.2d at 1460 (citation omitted).

Plaintiff was offered an executive officer position at Kinross, with the title of vice president. (Exhibit 6 p. 35; Exhibit F). Plaintiff would have been part of an executive team and been involved in the trading and hedging activities

of the company. (Exhibit 6 p. 19). Kinross' job offer raised Plaintiff's salary from $165,000 to $175,000. (Exhibit 1 ¶ 19; Exhibit F). Kinross offered Plaintiff an option to purchase 50,000 Kinross shares and to convert Plaintiff's Amax options to Kinross shares. (Exhibit F; *but see* Exhibit 1 ¶ 19). While Plaintiff was not offered a target bonus at Kinross, Plaintiff admitted that he did not always receive his target bonus at AGI. (Lettes Deposition p. 82). Kinross offered Plaintiff a discretionary bonus package and offered to match the retirement, medical, and severance benefits Plaintiff had at AGI. (Exhibit F). Plaintiff acknowledged that Kinross' severance benefits were "the same" and that Kinross' benefits were reasonably comparable to AGI's benefits. (Exhibit I handwritten p. 12; Lettes Deposition p. 82).

Plaintiff was concerned with the level of autonomy that he would be permitted at Kinross. At AGI, Plaintiff reported to Shellhaas, President of AGI. (Lettes Deposition p. 37). Plaintiff also reported to the AGI Risk Management Committee (Exhibit 3 pp. 38-41). At Kinross, Plaintiff would have reported to the CFO and to a similar risk management committee. (Schoening Deposition pp. 10, 12; Exhibit 1 ¶ 18; Exhibit 5 pp. 22-23; Exhibit 6 pp. 13-15; *see also* Shellhaas Deposition p. 37). Plaintiff admitted that Kinross' CEO would have control over his level of autonomy. (Lettes Deposition pp. 117-18; *see also* Exhibit F). The evidence shows that Kinross planned to give Plaintiff substantial autonomy and expected Plaintiff to work in "much the same fashion" that he had while employed by AGI. (Schoening Deposition p. 12; Exhibit F).

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Plaintiff was also concerned that Kinross would not permit him to stay in Denver. However, the evidence shows that Kinross intended Plaintiff to remain in Denver. (Penny Deposition p. 22; Exhibit F; Exhibit M ¶ 3; Exhibit 5 pp. 23-24, 27; Exhibit 6 p. 37). Plaintiff concedes that no one at Kinross told him that he would be required to move to Toronto. (Lettes Deposition p. 123).

Plaintiff found Kinross' hedging program unequal to AGI's hedging program. (Lettes Deposition p. 101). Plaintiff conceded that energy hedging was not a large part of the program at AGI. (Lettes Deposition p. 42). Kinross did not have an interest rate hedging program because, unlike AGI, Kinross had little or no debt. (Exhibit 6 pp. 10, 18). While Kinross' hedging program was not as active or developed as AGI's hedging program, Kinross had a hedging program and Kinross intended to and did further develop its hedging program. (Exhibit 2 p. 50; Exhibit 3 pp. 44-45; Exhibit 5 pp. 9-14; Exhibit 6 pp. 9-12, 21-22, 34; Schoening Deposition p. 10). Plaintiff would have performed hedging activities for Kinross. (Lettes Deposition p. 102; Exhibit 6 pp. 19, 21-22). Plaintiff's hedging knowledge was the strength that he would have brought to Kinross. (Schoening Deposition p. 10; Exhibit 6 pp. 21-22).

It is apparent from the evidence that Plaintiff wanted Kinross to provide him a job virtually identical to the job he had at AGI. (Lettes Deposition pp. 61, 64) ("the same status, the same compensation, the same responsibilities, the same duties . . . the same discretion . . .). Defendants' position was that

> in any kind of a merger where two smaller companies joined together, positions can't be exactly the same and responsibilities can't be exactly the same. . . . everybody knows that in any merger event, that job responsibilities and duties are going to move around as part of the merger event. And as long as a person had essentially the same general responsibilities or comparable responsibilities in another position as to what he had before the merger, then he would not be eligible for a benefit.

(Crowl Deposition pp. 12-13, 20).

Based on their assessment of the relative responsibilities and compensation made in the Kinross job offer, Defendants believed that the Kinross job offer was "very comparable" to Plaintiff's job at AGI. (Exhibit H; Lettes Deposition p. 145; Schoening Deposition p. 9; Ward Deposition p. 66; Exhibit 5 pp. 22-23; Exhibit 7 p. 18). The court agrees. Although there were some differences in the reporting relationship and the amount of hedging that Plaintiff would do at Kinross, the Kinross job offer provided Plaintiff with the same title, an increase in salary, a discretionary bonus, health and welfare benefits equivalent to AGI's benefits, the same size staff, and a Denver location. The Kinross job offer was reasonably comparable to Plaintiff's job at AGI immediately prior to the merger. Defendants' interpretation of the Kinross job offer was not unreasonable or inconsistent with the provisions of the Plan. Defendants did not act arbitrarily or capriciously in denying Plaintiff severance

benefits under the Plan. Defendants are entitled to summary judgment on Plaintiff's First Claim for Relief in the Amended Complaint.

2. Alleged Procedural Violations

While Plaintiff has not alleged a claim pursuant to 29 U.S.C. § 1133 for breach of procedural requirements, he argues that Defendants' failure to comply with certain procedural requirements demonstrates that the denial of severance benefits was arbitrary and capricious, citing, *inter alia*, *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). *But see McKenzie v. General Telephone Co. of California*, 41 F.3d 1310, 1314 (9th Cir. 1994) (" '[c]ourts have either distinguished the facts of Blau or criticized its holding . . .' ") (*cert. denied*, 514 U.S. 1066 (1995)); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167-70 (3d Cir. 1990) ("[w]e believe that Blau's rather freewheeling statutory construction, . . . has little place in the context of a carefully balanced and reticulated statute like ERISA"). Plaintiff alleges various procedural violations. (Plaintiff's Brief in Opposition pp. 12-15). The court concludes that the alleged procedural violations do not render arbitrary and capricious Defendants' decision to deny severance benefits to Plaintiff.

Defendants cooperated with Plaintiff in his active pursuit of severance benefits under the Plan. "[O]n several occasions," plan administrator Crowl met with Plaintiff and discussed "his eligibility for benefits." (Crowl Deposition pp. 12-13; *see also* Exhibit 4 p. 37). Crowl explained to Plaintiff "specifically what the requiring and triggering events would

be for him to become eligible for the benefits" and "the definition of comparability" of jobs. (Crowl Deposition p. 12). By at least May 19, 1998, Plaintiff knew that Crowl had determined that the job offer made by Kinross to Plaintiff was comparable to Plaintiff's job with AGI. (Lettes Deposition p. 148).

Because Plaintiff was still employed by AGI until the date of the merger on June 1, 1998, Crowl determined that Plaintiff was not entitled to benefits prior to June 1, 1998. (Crowl Deposition pp. 13-14; Exhibit 2 p. 71; *see also* Exhibit 3 p. 124). Deborah Friedman, general counsel for AGI, consulted with outside counsel, whose opinion was also that Plaintiff was not entitled to severance benefits before June 1, 1998. (Exhibit 3 pp. 118, 122). Crowl had determined by May 26, 1998 that Plaintiff was not entitled to severance benefits. (Exhibit 4 p. 38). Plaintiff was told by Shellhaas on or about June 1, 1998 that he would not be receiving severance benefits. (Lettes Deposition p. 149).

Crowl ceased being the plan administrator on June 1, 1998. (Crowl Deposition pp. 13-14). Plaintiff sent his first claims letter to Crowl on May 26, 1998. Schoening was not hired by Kinross until July 1, 1998 and was not appointed as the plan administrator for Kinross until November 12, 1998. (Exhibit J). Due to the press of business associated with the merger, Schoening did not respond to Plaintiff's first claims letter. (Schoening Deposition p. 13). Schoening responded to Plaintiff's second claims letter. Schoening reviewed the terms of Kinross' job offer, Plaintiff's numerous submissions (Exhibit 1), and consulted with Crowl, Buchan, Penny, and outside counsel. (Schoening Deposition pp. 6-7, 9). On

November 19. 1998, Schoening communicated to Plaintiff in writing that Plaintiff was not entitled to severance benefits under the Plan. (Exhibit 19; Exhibit 1 ¶ 26).

While Plaintiff disagrees with Defendants' ultimate decision that he was not entitled to severance benefits, the evidence shows that Plaintiff was afforded ample opportunity to pursue his claim for benefits. The evidence does not show that Plaintiff was caused any substantive harm by the alleged procedural violations. The evidence does not demonstrate that Defendants' decision was arbitrary and capricious based on the alleged procedural irregularities. The alleged procedural violations do not establish that Defendants' decision to deny severance benefits to Plaintiff was arbitrary and capricious.

In sum, Defendants are entitled to summary judgment on Plaintiff's First Claim for Relief in the Amended Complaint.

V. Breach of Fiduciary Duty Claim

Plaintiff claims that Defendants breached their fiduciary duties by failing to pay him benefits under the Plan and by failing to recover benefits alleged improperly paid to other key employees. (Amended Complaint ¶ 49).

ERISA fiduciaries must discharge their "duties with respect to a plan solely in the interests of the participants and beneficiaries, . . . in accordance with the documents and instruments governing the plan," and with the care, skill, prudence, and diligence that a prudent person would use.

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29 U.S.C. § 1104(a)(1)(A), (B), (D). ERISA does not enumerate all the powers and duties of trustees and other fiduciaries, but borrows some of the principles from the common law of trusts to impose a duty on a fiduciary to exercise such skill and care as a person of ordinary prudence would exercise, bearing in mind the special nature and purpose of an employee benefits plan, to preserve the trust corpus, deal impartially with the beneficiaries, and not to prefer the present interest of one group, among other things. *Ershick v. United Missouri Bank of Kansas City, N.A.*, 948 F.2d 660, 666 (10th Cir. 1991); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984); *Smith v. National Distillers & Chemical Corp.*, 728 F. Supp. 491, 493-94 (W.D. Tenn. 1989). A court may intervene in the administration of an employee benefit plan only when the trustees transgress their fiduciary duties by acting in an arbitrary and capricious manner. *Morse*, 732 F.2d at 1145.

Defendants dispute whether they are fiduciaries within the meaning of ERISA. Defendants assert that an unfunded deferred compensation plan, such as this Plan, does not involve fiduciary obligations and is not subject to fiduciary standards, citing *Pane v. RCA Corp.*, 868 F.2d 631, 637 (3d Cir. 1989). In light of the court's conclusions in parts III and IV of this Memorandum Opinion and Order, above, that Defendants' denial of severance benefits to Plaintiff was not arbitrary and capricious, the court concludes that, even if the Plan were subject to fiduciary standards, Defendants did not transgress any fiduciary duties under ERISA. Defendants are entitled to summary judgment on Plaintiff's Second Claim for Relief in the Amended Complaint.

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Accordingly, IT IS ORDERED:

1. Defendants' Motion for Summary Judgment is GRANTED. Summary judgment shall enter in favor of Defendants and against Plaintiff on Plaintiff's Amended Complaint.

2. Each party shall bear his, her, or its own costs and attorney fees.

3. The trial preparation conference scheduled Wednesday February 16, 2000 and the trial scheduled Monday February 28, 2000 are hereby VACATED.

DATED at Denver, Colorado, this 5th day of January, 2000.

BY THE COURT:

s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MAY 10, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 98-S-1899

MARK LETTES,

Plaintiff,

v.

AMAX GOLD, INC. and KINROSS GOLD CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on the Recommendation of United States Magistrate Judge Watanabe that Defendant Kinross' Motion to Dismiss (filed September 4, 1998) be granted and that Plaintiff be allowed to amend his complaint to allege his claims pursuant to the Employees Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. The Recommendation was filed on April 14, 1999 and served by mail on April 15, 1999. On April 23, 1999, Plaintiff filed his Objections to the Recommendation. The court must make a *de novo*

determination of those portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court has reviewed *de novo* Defendant's motion, Plaintiff's Response (filed October 9, 1998), Defendant's Reply (filed November 18, 1998), Defendant's Supplemental Authority (filed February 24, 1999), Plaintiff's Supplemental Response (filed March 5, 1999), the Recommendation, Plaintiff's Objections, Defendant's Response (filed May 3, 1999), the exhibits, and the applicable law, and is sufficiently advised in the premises.

1. Standard of Review

If, on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(b). Because both parties have submitted and the Magistrate Judge and the court have considered materials outside the pleadings, the court will treat the Defendant's motion as one for summary judgment under Fed. R. Civ. P. 56. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991). The court must determine "whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

2. Background

Plaintiff was an employee of AMAX Gold, Inc. ("AGI"). As a "key employee," Plaintiff was party to an agreement known as the Separation Plan for Key Employees ("the Plan"). The Plan contained provisions for severance upon certain conditions precedent. (Exhibit B to Plaintiff's Response Brief). Plaintiff alleges that when Defendants AGI and Kinross Gold Corporation merged, he was not offered a reasonably comparable position as defined by the Plan. Therefore, Plaintiff asserts that he became entitled to certain payments and benefits pursuant to the terms of the Plan. Defendants have denied such payments and benefits. Plaintiff alleges four claims for relief: (1) Defendants have breached the Separation Plan for Key Employees ("the Plan"); (2) Plaintiff is entitled to a declaratory judgment determining the rights and obligations of the parties under the Plan; (3) Defendants are "promissorily estopped" from denying that payments and benefits are due and owing to Plaintiff under the terms and provisions of the Plan; and (4) Defendants have been unjustly enriched to Plaintiff's detriment by failing and refusing to pay payments and benefits due and owing to Plaintiff under the terms and provisions of the Plan. (Complaint).

Defendant Kinross asserts that the Complaint must be dismissed because the Plan is an ERISA plan and, therefore, Plaintiff's state law claims are preempted by ERISA. The

Magistrate Judge agreed that the Plan is governed by ERISA and that Plaintiff's state law claims must be dismissed because they are preempted by ERISA. Plaintiff objects that the Plan is not governed by ERISA. However, Plaintiff concedes that if ERISA governs the Plan, his state law claims are preempted and he must pursue his claims under ERISA. (Response Brief p. 3).

3. Analysis

ERISA is a comprehensive federal statute enacted by Congress to regulate employer-sponsored employee benefit plans. If a state law claim relates to an employee welfare benefit plan, it is preempted by ERISA. 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52, 57 (1987); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 508 (10th Cir. 1991). ERISA's provisions are deliberately expansive, designed to ensure that employee benefit plans are regulated exclusively by federal law. *Pilot Life*, 481 U.S. at 45-46.

ERISA governs "employee benefit plan[s]." 29 U.S.C. § 1003(a). One form of employee benefit plan is an "employee welfare benefit plan." 29 U.S.C. § 1002(3). An "employee welfare benefit plan" is

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance

> or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title [which includes "severance or similar benefits," 29 U.S.C. § 186(c)(6)] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

A plan to pay severance benefits may constitute an "employee welfare benefit plan." 29 U.S.C. § 1002(1); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 7 n.5 (1987); *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 565 (2d Cir.), *cert. denied*, 119 S.Ct. 406 (1998); *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 75 (2d Cir.), *cert. denied*, 519 U.S. 1008 (1996). Because ERISA's preemption provision was intended "to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations," only "benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation" will implicate ERISA's preemption provision. *Fort Halifax*, 482 U.S. at 11-12; *see also Collins v. Ralston Purina Co.*, 147 F.3d 592, 595 (7th Cir. 1998); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1178 (10th Cir. 1997).

Appendix C

Citing several cases where other severance plans were found not governed by ERISA, Plaintiff argues that the Plan in this case is not governed by ERISA because it does not require an ongoing administrative scheme; rather, the Plan "contemplates a single event, short-term payout to a key employee of a lump sum that can be determined arithmetically . . . ." (Response Brief p. 6). The Plan here provides severance pay for its eligible key employees under certain limited circumstances. (Exhibit B to Plaintiff's Response Brief). The Plan provides certain employees severance benefits if they are separated from employment due to a "change of control" of the employer. (Exhibit B to Plaintiff's Response Brief pp. 1-9). Plaintiff contends that because all payments must be made within a short time after a "change of control," because the Plan extends only to a small number of key employees, and because the Plan was unfunded, the Plan does not require an ongoing administrative scheme and is not governed by ERISA. The court disagrees and concludes that the Plan here demonstrates sufficient indicia of an ongoing administrative scheme to be governed by ERISA.

The Plan requires more from its Administrator than a mere one-time mechanical calculation and payment. *See Fort Halifax*, 482 U.S. at 12; *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 258 (8th Cir. 1994); *Fontenot v. NL Industries, Inc.*, 953 F.2d 960, 962-63 (5th Cir. 1992); *Hijeck v. United Technologies Corp.*, 24 F. Supp. 2d 243, 250-51 (D. Conn. 1998). The making of severance payments pursuant to the Plan requires the "exercise of managerial discretion." *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463, 468 (2d Cir. 1993). The Plan grants the

Administrator "complete and discretionary authority to construe and interpret the Plan, correct defects, supply omissions, and reconcile inconsistencies and ambiguities in and with respect to the Plan." (Exhibit B ¶ 3.2(a) to Plaintiff's Response Brief). The Plan Administrator must determine, *inter alia*, whether a "change of control" has occurred under the terms of the Plan (Exhibit B Article I to Plaintiff's Response Brief), whether eligible employees are entitled to benefits (Exhibit B Article II to Plaintiff's Response Brief), and whether eligible employees have been offered "Comparable Employment," have performed their jobs satisfactorily, and have abided by the terms of all agreements even after separation. (Exhibit B ¶ 2.1 to Plaintiff's Response Brief). The Plan provides a dispute procedure for employees to challenge a denial of benefits. (Exhibit B ¶ 3.3 to Plaintiff's Response Brief). The Plan requires managerial discretion to the extent that benefits may be denied if

> there exists a special situation or circumstances for which it is necessary to establish a separate policy disallowing severance pay, on a group or individual basis, as determined by the Administrator in its sole discretion.

(Exhibit B ¶ 2.1(b)(3) to Plaintiff's Response Brief). The fact that AGI actually has in place an express administrative regime (Exhibit B Article III to Plaintiff's Response Brief) to evaluate applications for severance benefits is also "strong evidence that an ongoing administrative scheme is necessary. . . ." *Siemon*, 117 F.3d at 1178. Like the plans interpreted in several other cases, although severance payments were to be made within a short time after a "change of

control," the Plan extends only to a small number of key employees, and the Plan was unfunded, the Plan's administration requires "case-by-case, discretionary application of its terms. . . ." *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992); *see also Collins*, 147 F.3d at 597; *Tischmann*, 145 F.3d at 566-67; *Siemon*, 117 F.3d at 1179.

4. Conclusion

The court concludes that the Plan requires administrative discretion and that it is governed by ERISA. Therefore, all of Plaintiff's claims are concededly preempted by ERISA and must be dismissed.

Accordingly, IT IS ORDERED:

1. The Recommendation of United States Magistrate Judge is ACCEPTED.

2. Defendant's Motion to Dismiss is GRANTED.

3. Plaintiff may file and serve an amended complaint alleging his claims pursuant to ERISA within 20 days after the date of this Memorandum Opinion and Order.

DATED at Denver, Colorado, this 10th of May, 1999.

BY THE COURT:

s/ Daniel B. Sparr
Daniel B. Sparr
U.S. District Judge

APPENDIX D — RELEVANT STATUTES

Employee Retirement Income Security Act of 1974 as Amended, 29 U.S.C. §§ 1002(1)-(3), 1003, 1144(a) (1994)

§ 1002. Definitions

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which —

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be

treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained —

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if —

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

APPENDIX E — AMAX GOLD INC. SEPARATION PLAN FOR KEY EMPLOYEES EFFECTIVE MARCH 5, 1997

[Omitted here but submitted separately as Lodging Appendix]

APPENDIX F — RESOLUTIONS RELATING TO EMPLOYEE BENEFIT PLANS

[Omitted here but submitted separately as Lodging Appendix]